OAH Docket No. 4-3100-12604-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Wayne R. Higbee,

Petitioner,

vs.

St. Louis County,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS

Administrative Law Judge Bruce H. Johnson conducted a hearing in this contested case proceeding at 9:30 a.m. on Monday, March 6, 2000, at the Office of Administrative Hearings, Room 711, 320 West Second Street, Duluth, Minnesota. The record closed on May 1, 2000, when the parties' reply briefs were received.

Sarah Lewerenz, Attorney at Law, AFSCME Council 96, Suite 205, 211 West Second Street, Duluth, Minnesota 55802-1917, appeared at the hearing for the Petitioner, Wayne R. Higbee, and Shaun R. Floerke, Assistant County Attorney, Suite 501, 100 North 5th Avenue West, Duluth, Minnesota 55802-1298, appeared at the hearing for the Respondent, St. Louis County (the County).

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Veterans Affairs will make the final decision after reviewing this Report and the hearing record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions of Law, and Recommendations. Under Minnesota Law,[1] the Commissioner may not make his final decision until after the parties have had access to this Report for at least ten days. During that time, the Commissioner must give each party adversely affected by this Report an opportunity to file objections to the report and to present argument to him. Parties should contact the office of Bernie Melter, Commissioner, Minnesota Department of Veterans Affairs, 2nd Floor, Veterans Service Building, 20 W. 12th Street, St. Paul, Minnesota 55155-2079, to find out how to file objections or present argument.

STATEMENT OF THE ISSUE

The issues to be determined in this proceeding are:

Effective January 1, 1994, the County demoted Mr. Higbee, a stationary engineer at its laundry, from full-time to part-time. After working part-time for about a week, he resigned. In March 1995 the County reemployed him as a full-time stationary engineer at the new County jail. In determining whether the County failed to honor Mr. Higbee's veterans preference rights:

1. Did the County demote Mr. Higbee in good faith and for a legitimate purpose?

2. Did the County influence Mr. Higbee to resign in a way that made his resignation involuntary and violated the Veterans Preference Act?

3. Did the fact that the County reduced Mr. Higbee's wages and hours make his resignation involuntary?

4. Did the County violate the Veterans Preference Act by transferring two other employees to full-time stationary engineer positions before reemploying Mr. Higbee?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Wayne Higbee lives at 6128 Ogden Avenue, in Superior, Wisconsin. He is currently employed as a stationary engineer at the St. Louis County Jail in Duluth, Minnesota. He has been employed there since March 13, 1995.[2]

2. From August 29, 1966, until August 5 1968, Mr. Higbee served on active duty in the United States Navy. While on active duty, he was trained as a boiler technician. Following his active duty service, Mr. Higbee served for four years in the United States Naval Reserve, after which he was honorably discharged.[3]

3. St. Louis County is a political subdivision of the state. The County's personnel practices are governed by a merit system and by rules and regulations that have been adopted by its Civil Service Commission.[4]

4. From 1929 until now, the County has owned and operated a laundry on the grounds of Chris Jensen Nursing Home, another County facility in Duluth, Minnesota.[5] The laundry industrial equipment includes a mangle, a sheet folder, a

diaper machine, commercial washers, and both steam and gas dryers.[6] Much of that equipment is powered by three steam boilers.[7] Minnesota law requires that those boilers be operated and maintained by an operating engineer[8] licensed by the Minnesota Department of Labor and Industry.[9]

5. In August of 1985, the County created the new position of laundry manager and hired Ellis Thompson for that job. Mr. Thompson is an honorably discharged veteran who retired after twenty years of active duty in the United State Air Force.[10]

6. In 1985 the County's laundry was providing laundry services to several other county facilities and some private parties. It had eighteen employees, including two full-time stationary engineers, and was processing approximately one million pounds of laundry per year. The laundry had been operating at a deficit for some time. Its operating deficit for FY 1985 was about $85,000.[11]

7. In 1986 the County Board decided that the laundry needed to be operated as a self-supporting enterprise. To accomplish that, it directed Mr. Thompson to develop plans to make the laundry more efficient and financially self-sufficient.[12]

8. Mr. Thompson did establish a five-year plan for making the laundry more efficient. In 1986 he reduced the laundry's staff by six full-time equivalent positions.[13] His plan also involved giving the laundry's stationary engineers responsibility for doing the maintenance on much of the laundry equipment. That function had previously been contracted out. He also gave the laundry's engineers special projects that included replacing outdated equipment and making other physical improvements. Finally, in the early 1990s, Mr. Thompson had two of the laundry's three boilers upgraded and replaced, making them less expensive and easier for the engineers to operate.[14]

9. Sometime after leaving the Navy, Mr. Higbee obtained a Chief Class, Grade A boiler operating engineer license from the Minnesota Department of Labor and Industry.[15] He has held that licensure since he first began working for the County in May of 1991.[16]

10. On May 20, 1991, the County hired Mr. Higbee as a part-time, on-call stationary engineer at its laundry.[17] It was already employing two full-time stationary engineers there. In his on-call status, Mr. Higbee filled in for the two full-time stationary engineers during vacations, when one of them became ill, during emergencies, and when help was needed for special projects. He received benefits, but they were prorated.[18] Except when Mr. Higbee was called to work because of emergencies and illnesses, his work hours were scheduled on the stationary engineers' biweekly work schedule.[19]

11. In October 1992, when full-time stationary engineer Marvin Rish retired, the County transferred Mr. Higbee from his part-time on-call position to the vacant full-time stationary engineer position.[20] The full-time position guaranteed that Mr. Higbee would receive 37½ hours of work per week.[21] Otherwise, his job duties and pay

remained the same, except that his benefits were no longer prorated. The laundry's other full-time stationary engineer was Frank Giacomini, who was senior to Mr. Higbee and also an honorably discharged veteran.[22]

12. As full-time stationary engineers at the County's laundry, Mr. Higbee and Mr. Giacomini were responsible for operating and maintaining the laundry's three boilers,[23] as well as for performing repairs and preventative maintenance on much of the laundry equipment, including extractors, mangles, dryers, folders, and the diaper machine.[24] They also performed maintenance on the laundry building itself. Finally, both were involved in a number of special projects that modernized and improved the laundry's physical plant.[25]

13. Sometime in 1993 the County engaged an independent consultant to make further recommendations about reducing the laundry's costs.[26] One of the consultant's recommendations was reducing the laundry's stationary engineering staff. Based on that recommendation, the County decided to staff the laundry with only one full-time stationary engineer, while retaining another stationary engineer in a part-time on-call status to fill in during vacations, illnesses, emergencies, and other special situations.[27]

14. In the fall of 1993 rumors began circulating around the laundry that the County was going to be eliminating one of the two full-time stationary engineer positions. In October 1993 Mr. Higbee discussed those rumors with Mr. Thompson and Ernie Staufnecker, who was Mr. Thompson's supervisor. They both confirmed that the engineering staff would be reduced. Because Mr. Higbee was less senior than Mr. Giacomini, they indicated that it would most likely be Mr. Higbee who would be laid off. Also, Messrs. Thompson and Staufnecker indicated to Mr. Higbee that they would be transferring him back into a part-time on-call stationary engineer and that he could expect to work about half the hours that he had worked as a full-time stationary engineer.[28] Subsequently, on November 22, 1993, Mr. Thompson provided Mr. Higbee with a letter of recommendation in the event that he decided to seek other full-time employment.[29]

15. By letter dated December 9, 1993, the County informed Mr. Higbee that he was being laid off, effective December 21, 1993, because of the County's decision to reduce the laundry's full-time engineering staff from two stationary engineers to one. Since he was lower in seniority to Mr. Giacomini, the County transferred Mr. Higbee back to the part-time on-call position that it now had available.[30] The County subsequently corrected the layoff date to December 31, 1993.[31] Mr. Higbee received the layoff letter on December 17, 1993.[32]

16. Mr. Higbee's layoff letter advised him to contact Mr. Thompson, the laundry manager, concerning the future work schedule for the part-time on-call position.[33] Shortly after receiving the letter, Mr. Higbee did contact Mr. Thompson about future work schedule issues. At that time Mr. Thompson again expressed his belief that he could give Mr. Higbee approximately half the hours of work that Mr. Higbee had been receiving as a full-time stationary engineer.[34] Because the the need

for the part-time on-call stationary engineer could be unpredictable, Mr. Thompson did not guarantee the number of work hours that Mr. Higbee might be expected to work in the future.[35]

17. On about December 17, 1993, Mr. Higbee was given a copy of the laundry's work schedule for the first two weeks of January 1994.[36] His name appeared on the schedule, but scheduled hours for him had been whited out.[37] It was then the laundry's practice to list the hours of all full-time employees on its biweekly schedules; the hours of unscheduled hourly employees were not listed unless it had been clearly identified two weeks in advance that they would be needed on a specific date.[38]

18. On December 20, 1993, Mr. Higbee wrote a letter to Mr. Thompson that stated:

> "This is to inform you that due to the recent change in my job status with the Laundry, specifically the reduction from full-time permanent to an unscheduled hourly Stationary Engineer position, as per the letter I recieved (sic) on Dec. 17 1993 from Mr. Huber, Direction of St. Louis Co. Social Services dated December 9, 1993, I have chosen to terminate my employment with St. Louis County as of Jan. 5 1994 (10 working days notice.)"
>
> "My decision was based on the fact that the Laundry Manager cannot give me a guarentee (sic) of any hours now or in the future, therefore I must seek a more secure income."[39]

On December 29, 1993, Mr. Higbee gave the County an addendum to his resignation letter that changed his resignation date from January 5 to January 6, 1994.[40]

19. From January 1 through January 6, 1994, when his resignation took effect, Mr. Higbee accepted the demotion that the County had given him and worked as a part-time on-call stationary engineer at the laundry. During that six-day period, he worked 22.5 hours.[41]

20. When Mr. Higbee resigned, there still remained work to be done on the improvements that the engineering staff had been making to the laundry's physical plant and equipment, including installation of a new gas mangle, adding a new chemical room, and changing the burners on the boilers.[42]

21. On January 5, 1994, the day before Mr. Higbee's resignation letter took effect, the County's Civil Service Department sent a letter notifying him that the County had placed his name on its re-employment list for a full-time position until January 1, 1996.[43]

22. After resigning, Mr. Higbee applied for and received re-employment benefits from the State of Minnesota for twenty-six weeks. After that, he was self-employed in the refrigeration business until March 13, 1995, when he exercised his re-employment rights to accept a position as a full-time stationary engineer at the new

County jail.[44] At the time of the hearing in this matter, Mr. Higbee continued to be employed by the County in that position.[45]

23. After Mr. Higbee resigned his position as a part-time on-call stationary engineer, the County first used retired County stationary engineers to replace him while it looked for a longer term replacement with an appropriate license.[46] During 1994 Leo Whalen worked 1158.71 hours in that position, with Vern Johnson working 180 hours, Don Wilton working 142.5 hours, and Paul Smith working 45 hours.[47] In the aggregate, Mr. Higbee's replacements worked 1,525.71 hours in 1994.[48] Mr. Giacomini, the laundry's full-time permanent stationary engineer, worked 1720.88 hours during the same period.[49]

24. In addition to filling in for Mr Giacomini during vacations, illnesses, and emergencies during 1994, Mr. Higbee's replacements also assisted Mr. Giacomini in performing repairs and maintenance at the laundry and in completing the improvements to the laundry's physical plant and equipment that remained uncompleted when Mr. Higbee resigned.[50] It took somewhat longer for the replacements to do repair, maintenance, and improvement work than it would have taken Mr. Higbee because they were less familiar with the laundry.[51]

25. From January 1 through March 15, 1995, Vern Johnson worked 142.5 hours as a part-time on-call stationary engineer at the laundry, and Leo Whalen worked 86.46 hours.[52] This was a total of 228.96 hours over 10½ weeks, or about 23 hours per week.[53]

26. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

27. The Administrative Law Judge adopts as Findings any Conclusions which are more appropriately described as Findings.

Based upon the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Minnesota law[54] gives the Administrative Law Judge and the Commissioner of the Department of Veterans Affairs authority to conduct this proceeding under the Veterans Preference Act[55] and to make findings, conclusions, and either recommendations or orders, as the case may be.

2. The Department has complied with all of the law's substantive and procedural requirements.

3. Mr. Higbee and the County were given proper and timely notice of the hearing in this matter.

4. Mr. Higbee is an honorably discharged veteran within the meaning of the Veterans Preference Act[56] and is therefore entitled to all of the Act's protections and benefits.

5. The County is a political subdivision of the state within the meaning of the Veterans Preference Act,[57] and its personnel practices are therefore subject to the Act's provisions.

6. The Veterans Preference Act[58] requires that a veteran be given notice of his or her right to a hearing to establish incompetency or misconduct prior to any action by a public employer that removes the veteran from his or her position.

7. The County did not notify Mr. Higbee of his right to a hearing or any other right under the Veteran's Preference Act either before or after it transferred him from a full-time to a part-time stationary engineer on January 1, 1994, or either before or after he resigned from the latter position on January 6, 1994.

8. A veteran's right to a hearing to establish incompetency or misconduct before removal normally does not apply when a public employer eliminates a veteran's position in good faith for some legitimate purpose.[59] This is also the case when a public employer eliminates a position in good faith for some legitimate person and demotes the incumbent veteran to a lower paying position rather than discharging him or her.[60]

9. Whether a veteran's position has been eliminated in good faith for a legitimate purpose is an affirmative defense for which a veteran's public employer has the burden of proof.[61]

10. The County established by a preponderance of the evidence that its decision in 1993 to further reduce the operating costs of its laundry by reducing the stationary engineering staff from two full-time engineers to one full-time and one part-time engineer was made in good faith and for a legitimate purpose. At the time that reduction in force occurred, Mr. Higbee was the less senior veteran in a full-time stationary engineer position. It was therefore appropriate for the County to demote him rather than Mr. Giacomini, the laundry's other full-time stationary engineer.

11. Since Mr. Higbee was the less senior employee in his class and since his demotion was done in good faith and for a legitimate purpose, the County did not deny Mr. Higbee any rights provided to him by the Veterans Preference Act in connection with his demotion.

12. Mr. Higbee resigned his position as a part-time on-call stationary engineer at the County laundry effective as of January 6, 1994.

13. Where a veteran has resigned from his or her position, he or she may still be entitled to a hearing under the Veterans Preference Act if the resignation was improperly forced or influenced by the public employer.[62] The veteran has the burden

of proving that he or she resigned because of good cause attributable to the public employer.[63]

14. Neither the County nor any of its officials or employees knew in advance that there would be significantly more than half-time hours for Mr. Higbee to work as a part-time on-call stationary engineer at the laundry in 1994.

15. The County did not influence Mr. Higbee to resign his stationary engineer position. Specifically, the County did not expressly represent or convey a reasonable impression to him that he would be receiving little or no work as a part-time on-call stationary engineer.

16. Reduction of an employee's work hours or compensation may be good cause for the employee to resign that is attributable to the employer for the purpose of determining whether the employee may receive reemployment benefits.[64] But such reductions alone do not render a veteran's resignation involuntary for purposes of the Veterans Preference Act if the public employer made the reductions of work hours or compensation in good faith and for a legitimate purpose.[65]

17. Demoting Mr. Higbee by reducing his work hours and compensation did not provide him with a good cause attributable to the County for resigning and thereby make his resignation involuntary for purposes of the Veterans Preference Act. And in that respect, the County did not deny Mr. Higbee any rights provided to him by that Act.

18. The County did not violate the Veterans Preference Act by choosing to transfer two other employees to vacant stationary engineer positions in December 1994 and February 1995 rather than to rehire Mr. Higbee for either of those positions.

19. These Conclusions are made for the reasons set out in the Memorandum which is attached to and incorporated by reference in these Conclusions.

20. The Administrative Law Judge adopts as Conclusions any Findings which are more appropriately described as Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends that the Commissioner DISMISS Mr. Higbee's petition for relief, with prejudice.

Dated this 10th day of May 2000.

BRUCE H. JOHNSON
Administrative Law Judge

Recorded: 3 tapes – no transcript prepared.

NOTICE

Under Minnesota law,[66] the Commissioner must serve his final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

I. Mr. Higbee's Demotion Resulted from a Good Faith Reduction in Force

Mr. Higbee actually makes two separate claims under the Veterans Preference Act.[67] The first is that the County demoted him by laying him off as a full-time stationary engineer and transferring him to part-time on-call stationary engineer— a transfer that resulted in a loss of pay. That demotion, he argues, violated the Veterans Preference Act because the County failed to notify him of his right to a hearing on whether there was cause to demote him.

Under Minnesota law,[68]

> [n]o person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, *shall be removed from such position or employment except for incompetency or misconduct shown after a hearing*, upon due notice, upon stated charges, in writing. [Emphasis supplied.]
>
> Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge.

For purposes of the Act's notice requirement, the term "removal" is considered to embrace a demotion.[69]

The County concedes that a demotion occurred and that it did not notify Mr. Higbee of any veterans preference rights, but it claims it was not required to do so because his transfer and demotion were part of a good faith reduction in force at the laundry. The requirement of providing a veteran with a hearing to establish incompetency or misconduct before discharging him does not apply when a public employer eliminates a veteran's position in good faith for some legitimate purpose, such as when it is part of a good faith reduction in force.[70] This is also the case when a public employer eliminates the veteran's position in good faith for some legitimate reason and demotes him or her to a lower paying position instead of completely ending employment.[71]

To establish its affirmative defense, the County relies mainly on the testimony of Mr. Thompson, the laundry manager. He testified that as early as 1986, some five years before Mr. Higbee first came to work at the laundry, the County had made the decision to operate it as an enterprise that must at least break even financially, if not

make a profit. Mr. Thompson went on to indicate that soon after that decision was made, he made some immediate reductions to the laundry staff and embarked on a long term program to make the laundry as efficient and financially viable as possible. There were several features of that program that affected the job duties of the laundry's stationary engineers. Mr. Thompson gave them the added responsibility for performing maintenance work that had previously been contracted out. He then upgraded or replaced two of the laundry's three boilers, making them less expensive and easier for the engineers to operate.[72] And over the years Mr. Thompson assigned the stationary engineers, particularly Mr. Higbee, a number of special projects that involved replacing outdated equipment and making significant physical improvements to the laundry's physical plant.[73] The essence of Mr. Thompson's testimony was that those physical improvements had largely been completed by 1993, and that the laundry no longer needed two full-time stationary engineers on duty at all times. He also indicated that an independent consultant had confirmed his own opinion and recommended reducing the laundry's stationary engineering staff.[74] Mr. Higbee was aware of the consultant's recommendation.[75] The County argues that these facts prompted it to demote Mr. Higbee to part time and that they establish that his demotion was done in good faith and for a legitimate purpose.[76]

Mr. Higbee's argument concerning his demotion is that any reduction in force of stationary engineers was unnecessarily premature and that the County in essence continued his full-time position at least into 1994 and arguably into 1995, staffing it with less senior non-veterans. He relies mainly on three appellate decisions involving *Young v. City of Duluth*[77] to support that argument. Specifically, Mr. Higbee cites the following observation by the Minnesota Supreme Court:

> Of course, the village council could not, under the pretext of abolishing the position, continue it under some other name. There would have to be a real, not a sham or pretended, abolishment. Where the abolishment of an office or position has been held to be a sham and pretended, it generally has appeared that there was prompt re-creation of the office or position under a different name or assignment of the work thereof to another department, followed by appointment of a new appointee to perform the work formerly done by the incumbent of the office or position claimed to have been abolished.[78]

And in further support of his contention that the County fell short of acting in good faith simply by hiring less senior non-veteran replacements after he resigned, Mr. Higbee relies on the following instructions in *Young*:

> If the city merely reassigned Young's duties to nonveteran employees less senior than he, his position was not abolished in good faith, and he is entitled to reinstatement with back pay. The Veterans Preference Act is applicable to cases in which public employers reassign duties in times of revenue shortfalls and budget cuts. No exception in the Act exists for such situations. Thus, veterans have a preference over nonveteran employees less senior than they to continue to perform duties for which

they are qualified if the public employer continues to need such duties performed.[79]

Mr. Higbee argues that at least some of replacement part-time stationary engineers who replaced him were non-veterans. And he relies on evidence that in 1994 the part-time stationary engineers that the County hired to replace him worked about 1,526 hours.[80] By his calculations, that amounted to about 84% of the hours that a full-time engineer would have worked between January 1, 1994 and March 13, 1995, when the County reemployed him.[81] Finally, Mr. Higbee relies on the fact that the replacement part-time engineers continued to work on some of the special projects that he had been working on when he was laid off. In summary, Mr. Higbee argues that the County allowing part-time, non-veteran stationary engineers to work about over 80% of what would have been full-time hours in 1994 and 1995 conclusively establishes under *Niemi* and *Young* that the County lacked good faith in converting his full-time position into a part-time position.

In reply, the County argues that the only reason it hired non-veteran replacements to fill the position to which Mr. Higbee had been demoted was that Mr. Higbee resigned from that part-time position. As evidence of its good faith, the County again points to evidence that it was following the advice of an independent consultant when it converted Mr. Higbee's position from full-time to part-time.

What *Niemi* and *Young* stand for is that a veteran is entitled to relief whenever a personnel transaction, such as Mr. Higbee's demotion, is found to be a sham. The Minnesota Supreme Court indicated that "prompt re-creation of the office or position under a different name" is evidence of a sham or pretended elimination of a position.[82] In *Young* and *Niemi,* the public employers laid the veterans off without offering them some other position. But here the County offered Mr. Higbee a replacement position (albeit a demotion), and he actually worked in it for a week before his resignation took effect.[83] There is no evidence tending to suggest that if Mr. Higbee had not resigned, the County would have prevented him from continuing to work in his part-time position or would have transferred some of those duties to less senior non-veterans. Actually, Mr. Higbee's replacements together only worked between 67% and 76% of what he estimates a full-time stationary engineer would have worked in 1994.[84] In 1995 the part-time stationary engineers worked about 861 hours or about 47% of the hours that Mr. Giacomini worked.[85] In other words, the hours worked in the part-time position had decreased to about half time by the first quarter of 1995.[86] And there was also evidence that if Mr. Higbee had not resigned the part-time position, he would have ended up working fewer hours in 1994 than his replacements did because of his familiarity with the laundry's physical plant. In other words, the facts here negate the kind of inferences that were raised in *Young* and *Niemi* — namely, that the County intended the conversion of Mr. Higbee's position from full-time to part-time to be a pretext or a sham. Rather, the evidence established that the changes that the County made to Mr. Higbee's position were part of a good faith effort to reduce the laundry's operating costs.[87] At most, the Mr. Thompson estimate of when the laundry's second engineer position would drop from full-time to about half time was somewhat premature.

In summary, whether or not eliminating a position that results in a veteran's discharge or demotion was done in good faith for a legitimate purpose is an affirmative defense for which the veteran's public employer has the burden of proof.[88] Unlike *Young* and *Niemi*, the facts of this case do not necessarily raise an inference of bad faith on the County's part. The fact that the part-time replacement stationary engineers put in nearly half time in 1994 at most suggests that they were less familiar with the laundry's physical plant than Mr. Higbee was. Rather than a sham, the evidence suggests that Mr. Thompson may have made an honest error in estimating the need for part-time engineers during that first year. But his estimate for 1995 was accurate. What the *Young* cases address is situations where public employers engage in shams and pretexts to deprive veterans of their positions. They were not meant to apply to honest errors in assessing the extent of a public employer's staffing needs. In short, the ALJ concludes that the County met its burden of proving that Mr. Higbee's demotion was done in good faith and for the legitimate purpose of reducing the laundry's cost of operation.

II. Mr. Higbee's Resignation from His Part-Time Position Was Voluntary

Mr. Higbee's second contention is that the County influenced him to resign and that his resignation was therefore involuntary. He alleges two improper influences. First, Mr. Higbee claims that Mr. Thompson knew in advance that there would be significantly more than half-time hours available to him in 1994 and improperly failed to disclose that fact to him. Alternatively, he claims that Mr. Thompson told him that there would be no work at all for him in 1994.

Parenthetically, Mr. Higbee's request for relief based on involuntary resignation — that is, full back pay and seniority — is based on the assumption that the position from which he resigned was a full-time rather than a part-time position. And that, in turn, is based on two other assumptions. The first is that when he left the laundry, it still needed a second full-time equivalent stationary engineer. The second assumption is that the County's alleged improper influence or nondisclosure had also induced him to accept the demotion to part time, since he actually worked about half-time[89] in that position for about a week until his resignation took effect .

In Brula v. St. Louis County, 587 N.W.2d 859, 862 (Minn. App. 1999), the Court of Appeals held that "a veteran who resigns, voluntarily or involuntarily, without good cause attributable to the employer is not entitled to notice and hearing under the VPA." In the course of that decision, it indicated that it was appropriate to look to the body of Minnesota case law pertaining to reemployment insurance claims to determine whether or not a veteran's resignation is for good cause attributable to the employer.[90] In those reemployment cases, the Court of Appeals has described 'good cause' in the following way:

> "Good cause" is a reason that is "real, not imaginary, substantial not trifling, and reasonable, not whimsical; there must be some compulsion

> produced by extraneous and necessitous circumstances." [Citation omitted.] The standard for determining good cause is "the standard of reasonableness as applied to the average man or woman, and not to the supersensitive."[91]

Referring to reemployment benefit law, Mr. Higbee first argues that Mr. Thompson influenced him to resign in two ways. First, he claims that Mr. Thompson knew or should have known that the laundry would still be needing a second full-time stationary engineer in 1994 but withheld that information from him. Mr. Higbee offered no evidence of Mr. Thompson's actual knowledge to support this claim. Rather, he argues that Mr. Thompson's knowledge can necessarily be inferred from the fact that there was still special project work to be done when he left and the fact that his successors worked somewhat more than half time. But neither of those facts compel the inference that Mr. Higbee suggests. Mr. Higbee calculates that a full-time engineer at the laundry would be paid for 2,081 hours.[92] Mr. Giacomini's total paid hours in 1994 were 1,938.38, or about 142.62 less than full-time.[93] In other words, Mr. Giacomini only occupied his position about 93% of full-time that year. There was no evidence that this would have been foreseeable to Mr. Thompson. Additionally, Mr. Higbee's and his replacements worked a total of 1,587.71[94] hours in 1994 — about 76% of the hours of a full-time engineer, or only about 67% if one assumes that they had to make up the hours that Mr. Giacomini did not obtain. Moreover, there was no evidence on how much time Mr. Higbee and his replacement spent on special projects in 1994, but there was evidence that his replacements spent more time on the special projects than Mr. Higbee would have because of their unfamiliarity with the laundry's physical plant.[95] In short, Mr. Higbee failed to establish that the laundry needed a second full-time stationary engineer in 1994, and the inferences that he relies on to establish Mr. Thompson's knowledge of such a need are therefore not inevitable. Rather, the evidence only establishes that Mr. Thompson was being conservative in telling Mr. Higbee that he could expect to work half-time as a part-time on-call stationary engineer.

Mr. Higbee's second allegation that Mr. Thompson told him that he would be receiving no hours at all in the future is similarly unsupported by the evidence. Both parties agree that in about October 1993 Mr. Thompson and his supervisor, Ernie Staufnecker, informed Mr. Higbee that he was likely to be laid off from his full-time stationary engineer position in the near future and demoted to part-time status. There is also general agreement that they advised Mr. Higbee about that time that they could not actually guarantee the number of hours that he would be receiving but that he could expect to be working about half time beginning January 1, 1994.[96] The evidence further established that the reason why Mr. Thompson could not guarantee the number of hours was that one of the main responsibilities of the on-call stationary engineer was to fill in for the full-time engineer during vacations, illnesses, and on other unpredictable occasions.[97] Mr. Higbee knew this to be the case because he had been an on-call engineer for the first year and a half of his employment with the County. These, then, were Mr. Higbee's expectations at about the time he received his layoff letter on December 17, 1993. The evidence also established that County prepared the work schedule for stationary engineers two weeks in advance.[98] So Mr. Higbee must have seen the schedule sometime near December 17, 1993, about the same time he

received his layoff letter. He testified that his scheduled work hours had been whited out, and that he took that to mean that he would not be working at all during the first two weeks of January 1994.[99] Mr. Higbee also testified that sometime in December 1993 he had asked Mr. Thompson about hours, and that Mr. Thompson responded with words to the effect that he would receive no hours now and in the future.[100] Mr. Higbee therefore argues that a clear impression had been conveyed to him that the laundry would have no work for him, and it was that impression that influenced him to submit his resignation on December 20, 1993.[101]

Mr. Thompson did not deny that there may have been deletions on the schedule that Mr. Higbee received on or about December 17, 1993. But he testified that the hours of on-call engineers were often unpredictable, and that those hours would not be listed on the schedule unless it was clearly identified two weeks in advance that they would be needed on a specific date.[102] Mr. Thompson went on to categorically deny ever telling Mr. Higbee that he would receive no hours now and in the future, or using words to that effect.[103] The ALJ also notes that in his resignation letter, Mr. Higbee referred to the lack of *guarantee* of his hours, not to a complete lack of hours.

After considering and evaluating the evidence, the ALJ concludes that when he resigned, Mr. Higbee did not believe that he would not be obtaining any work at all as a part-time on-call stationary engineer. Rather, he still expected to be working at least about half time in that position, and he resigned because he believed that he could make more money in other ways than by remaining in on-call status. The ALJ also concludes that a reasonable person in Mr. Higbee's place would have had that same impression. The thrust of Mr. Higbee's testimony was that the absence of hours for him on the January work schedule caused him to infer that he would not be getting any work. But he never indicated directly confronting Mr. Thompson about what was on the work schedule, and Mr. Thompson denied that Mr. Higbee ever brought that subject up to him. So the evidence failed to establish that such a communication between them ever occurred. That apparent lack of specific communication, together with Mr. Higbee's prior experience in working as an on-call stationary engineer, suggests that he was aware that his work hours might be unpredictable and that he was not particularly alarmed about what he saw on the work schedule.

Both Mr. Higbee and Mr. Thompson agree that they had a late December conversation about Mr. Higbee's work hours. But they disagree about what was said. Mr. Higbee testified that he was told that he would receive no hours now or in the future. Mr. Thompson said that he reiterated his expectation that Mr. Higbee would be working part time. What aids in resolving this issue of credibility is what happened next — namely, Mr. Higbee actually did work 22.5 on-call hours at the laundry from January 1st until January 6th when his resignation became effective. That was slightly more than half time — about what Mr. Thompson had said his work expectation would be. As laundry manager, Mr. Thompson must have authorized that work, and someone must have told Mr. Higbee to report to work for those 22.5 hours, whether on a written schedule or by an oral request to report for duty. That Mr. Thompson would assign Mr. Higbee half-time work during the first week in his new position and about the same time tell him "that he would receive no hours now and in the future"[104] simply makes no

sense. It is for that reason that the ALJ believes Mr. Thompson's recollections of his discussion with Mr Higbee to be more accurate and reliable than Mr. Higbee's. And accepting Mr. Thompson's versions of those events, there is no factual basis for a reasonable impression on Mr. Higbee's part that he would be receiving little or no work as a part-time on-call stationary engineer.

Alternatively, Mr. Higbee relies on *Danielson Mobil, Inc. v. Johnson*[105] and *Cook v. Playworks,* [106] both holding that reducing an employee's work hours or wages, even as little as nineteen percent, is sufficient to give the employee cause to resign. First of all, the position from which Mr. Higbee resigned was that of a part-time on-call stationary engineer. Mr. Thompson had represented that to be a half-time position. Mr. Higbee himself cites evidence that there was an *increase* of projected work hours to over 80 percent of a full-time equivalent in 1994. And the evidence establishes that even though there was a decline in work hours in 1995, it still represented about a half-time position from the first of the year until about March 15th, when the County reemployed Mr. Higbee in a full-time position at another facility.[107]

But even if one were to consider Mr. Higbee as having resigned from his full-time stationary engineer position, the ALJ concludes that applying *Danielson Mobil* and *Playworks* to require a public employer to reinstate a veteran who has resigned after having had his or her work hours or earning reduced as part of a good faith reduction in force would be inconsistent with the Minnesota Supreme Court's holding in *State ex rel. Boyd v. Matson*[108] and a long line of subsequent cases. *Boyd* and the cases that have followed it have confirmed the right of public employers to discharge or demote veterans "in good faith and for some legitimate purpose," as opposed to mere subterfuges to oust them from their positions.[109] Allowing veterans to obtain reinstatement simply by resigning after having their hours or wages reduced would circumvent a well-established rule of law and prevent public employers from making good faith reductions in force that affect veterans.

III. The Veterans Preference Act Did Not Entitle Mr. Higbee to Reemployment With the County

Finally, Mr. Higbee argues the County failed to honor some re-employment rights that he claims to have had in December 1994 and February 1995. He argues that the County wrongfully allowed other County employees to transfer into stationary engineer positions rather than rehiring him at those times. But Mr. Higbee could not point to any provision in the County's civil service rules or in a collective bargaining agreement that gave a right to transfer into those positions.[110] Rather, he argues that the spirit of the Veterans Preference Act requires that it be applied to require public employers to rehire veterans into any open positions in their job classes.

On its face, Minn. Stat. § 197.46 only applies to *removals* of veterans from public positions. While there is authority that the term removal also embraces demotions, it does not necessarily include all of the other kinds of personnel actions that a veteran might consider to be adverse.[111] In effect, Mr. Higbee argues that the County's failure to rehire him in December 1994 and February 1995 also amounts to a "removal" under

the Veterans Preference Act. But he fails to cite any legal authority for that interpretation other than the spirit of the Act. By enacting the Veterans Preference Act, the legislature has certainly expressed a special solicitude for veterans. But the ALJ is not prepared to extrapolate that solicitude into a legal requirement that the legislature has never actually expressed. The ALJ therefore concludes that the County's allowing two of its other employees to transfer into open stationary engineer positions at other work sites rather than choosing to reemploy Mr. Higbee does not violate the Veterans Preference Act.

B. H. J.

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[1] Minn. Stat. § 14.61. (Unless otherwise specified, all references to Minnesota Statutes are to the 1998 edition.)

[2] Testimony of Mr. Higbee; Exhibit I.

[3] Exhibit 1 at p. 74; testimony of Wayne Higbee.

[4] Exhibit 1 at pp. 26-71.

[5] Testimony of Ellis Thompson.

[6] Exhibit 1 at p.177.

[7] Testimony of Ellis Thompson.

[8] As used in this Report, the term "stationary engineer" shall have the same meaning as "operating engineer," as defined in Minnesota Rules, part 5225.0050, subpart 14. (Unless otherwise specified, all references to Minnesota Rules are to the 1997 edition.)

[9] Minnesota Rules, parts 5225.0400 and 5225.1110.

[10] Testimony of Ellis Thompson.

[11] Testimony of Ellis Thompson.

[12] *Id*.

[13] Exhibit 1 at p. 178-180; testimony of Wayne Higbee.

[14] *Id*.

[15] Exhibit A.

[16] Exhibit 1 at p. 84.

[17] Testimony of Ellis Thompson; Exhibit I.

[18] Testimony of Wayne Higbee.

[19] *Id*.

[20] *Id*.; Exhibit F.

[21] Testimony of Wayne Higbee.

[22] Testimony of Ellis Thompson.

[23] Testimony of Wayne Higbee; Exhibit 1 at pp. 177-80.

[24] *Id*.

[25] *Id*.

[26] Testimony of Ellis Thompson.

[27] Testimony of Ellis Thompson.

[28] Testimony of Wayne Higbee and Ellis Thompson.

[29] Testimony of Ellis Thompson; Exhibit D.

[30] Exhibit E; testimony of Ellis Thompson.

[31] Exhibit E.

[32] Exhibit B.

[33] *Id*.

[34] Testimony of Ellis Thompson and Wayne Higbee.

[35] *Id*.; Exhibit B.

[36] Testimony of Ellis Thompson and Wayne Higbee.

[37] *Id*.

[38] Testimony of Ellis Thompson.

[39] Exhibit B.

[40] *Id*.

[41] Exhibit F.

[42] Testimony of Wayne Higbee.

[43] Exhibit 1, at p. 126.

[44] Exhibit I.

[45] *Id*. Testimony of Jim Gottschald.

[46] Testimony of Ellis Thompson.

[47] Exhibit 1 at pp. 129-32; Exhibit F.

[48] Exhibit F.

[49] Exhibit F.

[50] Testimony of Ellis Thompson.

[51] *Id*.

[52] Exhibit 1 at pp. 129 and 131.

[53] *Id*.

[54] Minn. Stat. § 14.50 and § 197.481.

[55] Minn. Stat. § 197.46.

[56] Minn. Stat. § 197.447 and § 197.46.

[57] Minn. Stat. § 197.46.

[58] *Id*.

[59] *State, ex rel. Boyd v. Matson*, 155 Minn. 137, 193 N.W. 30 (Minn. 1923).

[60] *Leininger v. City of Bloomington*, 299 N.W.2d 723 (Minn. 1980).

[61] *State, ex rel. Caffrey v. Metropolitan Airport Commission*, 246 N.W.2d 637 (Minn. 1976); *cf. Southern Minnesota Municipal Power Agency v. Schrader*, 394 N.W.2d 796, 802 (Minn. 1986).

[62] *Brula v. St. Louis County*, 587 N.W.2d 859 (Minn. App. 1999).

[63] *Id*.; *cf. Shanahan v. District Memorial Hospital*, 495 N.W.2d 894, 897 (Minn. App. 1993).

[64] *Danielson Mobil, Inc. v. Johnson,* 394 N.W.2d 251, 253 (Minn. App. 1986); *Cook v. Playworks,* 541 N.W.2d 366, 368-69 (Minn. App. 1996).

[65] *See State ex rel. Boyd v. Matson*, 193 N.W. 30 (Minn. 1923); *see also State ex rel. Niemi v. Thomas*, 27 N.W.2d 155, 157 (Minn. 1947), *State ex rel. Caffrey v, Metropolitan Airport Commission*, 246 N.W.2d 637, 641 (Minn. 1976), and *Myers v. City of Oakdale*, 409 N.W.2d 848, 850 (Minn. 1987).

[66] Minn. Stat. § 14.62, subd. 1.

[67] Minnesota Statutes, section 197.46.

[68] *Id*.

[69] *Leininger v. City of Bloomington*, 299 N.W.2d 723 (Minn. 1980).

[70] *State, ex rel. Boyd v. Matson*, 155 Minn. 137, 193 N.W. 30 (Minn. 1923).

[71] *Leininger v. City of Bloomington*, 299 N.W.2d 723 (Minn. 1980).

[72] *Id*.

[73] Testimony of Wayne Higbee; *see also* Exhibit 1 at pp. 177-180.

[74] Testimony of Ellis Thompson.

[75] Testimony of Wayne Higbee.

[76] Mr. Giacomini was also a veteran with more seniority than Mr. Higbee. Accordingly, if the reduction was warranted and in good faith, Mr. Higbee does not argue that it was Mr. Giacomini who should have been demoted.

[77] 372 N.W.2d 57 (Minn. App. 1985), *aff'd as modified*, 386 N.W.2d 782 (Minn. 1986), *aff'g and rev'g in part after remand*, 410 N.W.2d 27 (Minn. App. 1987).

[78] *State ex rel. Niemi v. Thomas*, 27 N.W.2d 155, 158 (Minn. 1947), quoted in *Young* at 386 N.W.2d at 737-38.

[79] 386 N.W.2d at 738-39.

[80] This was about 89% of the 1720.88 hours that the permanent engineer, Mr. Giacomini, worked that year. Mr, Higbee himself worked for another 22.5 hours as a stationary engineer in January before his resignation took effect on January 6, 1994. (*See* Exhibit F.)

[81] Petitioner's Brief at pp. 7-8.

[82] 27 N.W.2d at 158; *Young* at 386 N.W.2d at 737-38.

[83] Exhibit F.

[84] *See* discussion on pp. 17-18, below.

[85] *Id*.

[86] *Id*. Actually, the part-time on-call stationary engineer position had become about a half-time position by early 1995. *See* Finding of Fact No. 23.

[87] Evidence that the County may have been instrumental in influencing Mr. Higbee to resign his part-time position is immaterial to whether or not it demoted him in good faith. Rather, that kind of evidence bears on an entirely different issue — whether or not the County removed him from his part-time position by influencing him to resign it. That issue is addressed in detail below.

[88] *State, ex rel. Caffrey v. Metropolitan Airport Commission*, 246 N.W.2d 637 (Minn. 1976); *cf*. *Southern Minnesota Municipal Power Agency v. Schrader*, 394 N.W.2d 796, 802 (Minn. 1986).

[89] 22.5 hours. *See* Exhibit F.

[90] *Id*. at 861.

[91] *Haskins v. Choice Auto Rental, Inc.*, 558 N.W.2d 507, 511 (Minn. App. 1997).

[92] Including holidays, personal leave, vacation etc. (Petitioner's Brief at pp. 7-8).

[93] Exhibit F.

[94] Exhibit F. Additionally, Mr. Higbee was paid for another 41.4 "hours other than work" in 1994. Presumably, that was for accrued vacation as of January 6, 1994, the day when he resigned.

[95] Testimony of Ellis Thompson.

[96] Testimony of Ellis Thompson and Wayne Higbee.

[97] Testimony of Ellis Thompson.

[98] Testimony of Wayne Higbee.

[99] *Id*.

[100] *Id*.

[101] Exhibit B.

[102] Testimony of Ellis Thompson.

[103] Testimony of Ellis Thompson.

[104] Mr. Higbee's characterization of his own testimony. (Petitioner's Brief at p. 4.)

[105] 394 N.W.2d 251, 253 (Minn. App. 1986).

[106] 541 N.W.2d 366, 368-69 (Minn. App. 1996).

[107] Exhibit 1 at pp. 129 and 131.

[108] 193 N.W. 30 (Minn. 1923).

[109] *Id*. at 32. *See also, for example, State ex rel. Niemi v. Thomas*, 27 N.W.2d 155, 157 (Minn. 1947), *State ex rel. Caffrey v, Metropolitan Airport Commission*, 246 N.W.2d 637, 641 (Minn. 1976), and *Myers v. City of Oakdale*, 409 N.W.2d 848, 850 (Minn. 1987).

[110] In fact, in March of 1995 the County did honor reemployment rights that Mr. Higbee had (*see* Exhibit 1 at p. 126) when it rehired him for a stationary engineer position at the County Jail. (Exhibit I; testimony of Jim Gottschald.)

[111] Although Minn. Stat. § 197.455 effectively gives veterans a hiring preference in the form of additional credit on open competitive examinations, that is a preference of very limited application that is also not germane here.